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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Sections 3101, 3111 and 3301 of the Internal Revenue Code of 1954, which impose social security taxes on employers and employees, is constitutional as applied to persons who object, on religious grounds, both to the payment of such taxes levied to support public insurance benefits and to the receipt of such benefits.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutes involved	1
Statement	1
The question is substantial	4
Conclusion	14
Appendix A	1a
Appendix B	9a
Appendix C	10a
Appendix D	11a

TABLE OF AUTHORITIES

Cases:

American Friends Service Committee v. *United States*, 368 F. Supp. 1176, rev'd 419 U.S. 7	1, 8
Anthony v. *Commissioner*, 35 T.C.M. (CCH) 1357 (Sept. 27, 1976), aff'd, 566 F.2d 1168, cert. denied, 436 U.S. 904	10
Autenrieth v. *Cullen*, 418 F.2d 586, cert. denied, 397 U.S. 1036	10
Braunfeld v. *Brown*, 366 U.S. 599	5-6
Cantwell v. *Connecticut*, 310 U.S. 296	5
Carmichael v. *Southern Coal Co.*, 301 U.S. 495	8, 11
Chapman v. *Alexander*, 421 F. Supp. 930, aff'd, No. 76-6086 (5th Cir. Apr. 28, 1977)	9
Committee For Public Education v. *Nyquist*, 413 U.S. 756	13
Costello v. *Commissioner*, 34 T.C.M. (CCH) 320 (Mar. 12, 1975) aff'd, 76-1 U.S.T.C. 9117 (2d Cir. Nov. 20, 1976)	10
Escofil v. *Commissioner*, 376 F. Supp. 521, aff'd, 493 F.2d 1400	9, 10

Cases—Continued: Page

Fleming v. *Rhodes*, 331 U.S. 100 1
Follett v. *McCormick*, 321 U.S. 573 ..... 5, 6
Fowler v. *Rhode Island*, 345 U.S. 67 5
Gillette v. *United States*, 401 U.S. 437 ..... 6, 8
Graves v. *Commissioner*, 579 F.2d 392 10
Hatcher v. *Commissioner*, 37 T.C.M. (CCH) 304, aff'd, 79-2 U.S.T.C. ¶ 9532 (10th Cir. July 27, 1979); 9
Helvering v. *Davis*, 301 U.S. 619 11
Henson v. *Commissioner*, 66 T.C. 835 9
Jaggard v. *Commissioner*, 582 F.2d 1189, cert. denied, 440 U.S. 913 9
Johnson v. *Robison*, 415 U.S. 361 ..... 6, 9
Kelley v. Terry, No. 78-2750 (9th Cir. Aug. 27, 1980) 9
Lerner v. *Commissioner*, 34 T.C.M. (CCH) 331 Mar. 17, 1975, aff'd, No. 75-1770 (3d Cir. Jan 13, 1976) 9, 10
Lull v. *Commissioner*, 602 F.2d 1166, cert. denied, 444 U.S. 1014 10
McDaniel v. *Paty*, 435 U.S. 618 ..... 6, 7
Murdock v. *Pennsylvania*, 319 U.S. 105 6
Muste v. *Commissioner*, 35 T.C. 913 10
Palmer v. *Commissioner*, 52 T.C. 310 ..... 9, 10
Prince v. *Massachusetts*, 321 U.S. 158 6
Randolph v. *Commissioner*, 74 T.C. 284 ..... 9, 10
Reynolds v. *United States*, 98 U.S. 145 6
Runnings v. *Commissioner*, 36 T.C.M. (CCH) 904 (July 13, 1977) 10
Russell v. *Commissioner*, 60 T.C. 942 10
Sherbert v. *Verner*, 374 U.S. 398 6
Steward Machine Co. v. *Davis*, 301 U.S. 548 . 11
Torcaso v. *Watkins*, 367 U.S. 488 7

Cases—Continued: Page

United States v. *Christian Echoes Ministry, Inc.* 404 U.S. 561 1

United States v. *Haworth*, 386 F. Supp. 1099. 10

United States v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 11

Varga v. *United States*, 467 F. Supp. 1113, aff'd, No. 79-1371 (4th Cir. Feb. 27, 1980) . 9, 10

Ward v. *Commissioner*, 608 F.2d 599, cert. denied, No. 79-1313 Apr. 28, 1980 9

Wisconsin v. *Yoder*, 406 U.S. 205 6

Constitution and statutes:

United States Constitution, First Amendment 12, 13

Due Process Clause 12

Free Exercise Clause 4, 5, 6, 7, 8, 10, 11, 12

Internal Revenue Code of 1954 (26 U.S.C.):

Section 1401 ..... 2, 3, 11, 12

Section 1402 ..... 2, 11

Section 1402(e) 3

Section 1402(g) 2, 3, 4, 9 11, 12, 13

Section 1402(h) 2

Section 3101 11

Section 3111 11

Section 3301 11

Section 7421(a) 4

Social Security Act, ch. 531, 49 Stat. 620 2

Social Security Act Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540, 26 U.S.C. (1952 ed.) 1401 and 1402 ..... 2, 11

Social Security Act Amendments of 1965, Pub. L. No. 89-97, Section 321(a), 79 Stat. 286 .. 2

Constitution, and statutes,—Continued: Page

Tax Reform Act of 1976, Pub. L. No. 94-455, Section 1901(g)(155)(B), 90 Stat. 1520 2

Miscellaneous:

H.R. Rep. No. 213, 89th Cong., 1st Sess. (1965) 3, 12

Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess. (1965) 12, 13

OPINION BELOW

The findings of fact and conclusions of law of the district court (App. A, *infra*, 1a–8a) are not officially reported.

JURISDICTION

The judgment order of the district court was entered on July 15, 1980 (App. B, *infra*, 9a). A notice of appeal to this Court was filed on August 14, 1980 (App. C, *infra*, 10a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes a direct appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States is a party. A direct appeal lies where, as here, a statute is held unconstitutional as applied to particular circumstances. *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

STATUTES INVOLVED

Sections 1402(g), 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.), are set forth in App. D, *infra*, 11a–15a.

STATEMENT

1. Appellee is a member of the Old Order Amish religious sect. That sect seeks to preserve a way of life emphasizing community welfare. A major tenet of the Old Order Amish faith is that each member must provide for the other members of the community who are in need of economic assistance. Because Old Order Amish members therefore care for their aged, their sick, and their unemployed, they do not need any form of social welfare benefits from outside their self-sufficient community. Moreover, the Old Order Amish believe that it is both a sin to accept social security benefits and to pay social security taxes. As a result, members of the sect are not

permitted by their religious beliefs to accept any benefits under the social security system, such as assistance for old age, death, disability or medical expenses (App. A, *infra*, 3a).

The social security system was established in 1935 by the Social Security Act, ch. 531, 49 Stat. 620, to provide a system of old age and unemployment benefits. The social security benefits are supported by various taxes, including a tax imposed by the Federal Insurance Contributions Act (FICA) on employees with respect to their wages (26 U.S.C. 3101), an excise tax imposed by that Act on employers with respect to wages paid their employees (26 U.S.C. 3111), and a second excise tax imposed by the Federal Unemployment Tax Act (FUTA) on employers with respect to wages paid to employees (26 U.S.C. 3301). In 1950, Congress extended the federal social security system to cover self-employed persons and, at the same time, enacted a tax on self-employment income to fund such coverage. See Social Security Act Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540, 26 U.S.C. (1952 ed.) 1401 and 1402.

In 1965, Congress added Section 1402(g) to the Internal Revenue Code, which allows an exemption from the self-employment tax to persons who, by reason of their adherence to the established tenets or teachings of (and membership in) a "recognized religious sect or division thereof," are "conscientiously opposed to acceptance of any private or public insurance" providing death, disability, old age, retirement or medical benefits.[1] This exemption is granted, however, only where the applicant waives all benefits under the Social Security Act (whether based on self-employment income or wages received as an employee) and where the Secretary of Health and Human Services has determined (1) that the particular sect has the requisite tenets or teachings; (2) that the sect has had,

[1] This statutory exemption originally designated as Section 1402(h) of the 1954 Code, was added by Section 321(a) of the Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286. Section 1402(h) of the Code was redesignated as Section 1402(g) by Section 1901(g)(155)(B) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

for a substantial period, the practice of making reasonable provision for its dependent members; and (3) that the sect has been in existence at all time since December 31, 1950.[2]

In enacting the exemption in Section 1402(g), the legislative history shows that Congress specifically intended to benefit the Old Order Amish sect. It found the exemption justifiable where individual members of such a sect "cannot accept the benefits of insurance, including social security benefits, without renouncing basic tenets of * * * [their] religion" and "sincerely believe that payment of social security taxes is irreconcilable with their religious convictions." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). The proposal was limited, however, to the self-employment tax imposed by Section 1401 because Congress understood that such individuals, by reason of their religious beliefs, "limit their work almost entirely to farming and to certain other self-employment" (*ibid.*). Thus, Congress provided no statutory exemption from the employer and employee FICA and FUTA taxes at issue in this case.

2. During 1970-1977, appellee employed several other members of the Old Order Amish sect who worked on his farm and in his carpentry shop. He did not, however, either withhold income taxes from their wages, or pay FUTA taxes or the employer's share of FICA taxes with respect to those wages. In 1978, the Internal Revenue Service assessed appellee for unpaid employment taxes for the years in issue in an amount exceeding $27,000. Appellee paid taxes in the amount of $91 attributable to wages paid to his employees for the first quarter of 1973. He thereafter instituted this proceeding in the United States District Court for the Western District of Pennsylvania for a refund of the amount paid and for injunctive relief

[2] Section 1402(e) of the Code also grants an exemption from the self-employment tax to ordained, commissioned or licensed ministers, certain members of religious orders and Christian Science practitioners who are opposed to the receipt of social security benefits on the grounds of conscience or religious principle. Prior to 1967, the exemption was automatic. It must now be affirmatively claimed, however, and applies only with respect to earnings derived from services performed as "such minister, member, or practitioner."

against the Commissioner of Internal Revenue with respect to the unpaid balance of the assessments. Appellee claimed that the imposition of FICA and FUTA taxes on the wages paid his fellow members of the Old Order Amish sect violated both his own rights and the rights of his employees under the Free Exercise Clause of the First Amendment of the Constitution (App. A, *infra*, 1a-2a).[3]

The district court upheld appellee's claim and concluded that "the tax is declared invalid and unconstitutional" (App. A, *infra*, 8a) on the ground that it infringed his First Amendment right to free exercise of religion. In support of its conclusion, the court relied upon the exemption provided by Section 1402(g) of the Code, even though that exemption relates only to the FICA tax on income from self-employment and not to the employer's share of FICA and FUTA taxes on employees' wages. As the court saw the matter, "[t]his distinction between a self-employment payment as 'income tax' and deduction and payment of an employee's tax as an 'excise tax' is a distinction without a difference and raising it does little credit to the government agencies concerned" (App. A, *infra*, 3a-4a). It accordingly ruled that appellee "and employers who fall within the carefully circumscribed definition provided in 1402(g), are relieved from paying the employer's share of FICA and FUTA as it is an unconstitutional infringement upon the free exercise of their religion" (App. A, *infra*, 8a).[4]

THE QUESTION IS SUBSTANTIAL

The judgment of the district court—holding unconstitutional the imposition of certain social security taxes upon

[3] The portion of the assessment representing income taxes required to be withheld from wages is not in issue in this case; it is to be abated because appellee's employees paid their own income taxes.

[4] The district court denied appellee's request for injunctive relief against the collection of the balance of the assessment because of the bar of the Anti-Injunction Act (26 U.S.C. 7421(a)) against such actions. It did so, however, "with the knowledge that the government has agreed not to collect such taxes during the pendency of this litigation and in the belief that the future collection activities will be circumscribed by the holding of this case" (App. A, *infra*, 8a).

appellee and his employees—has erroneously nullified an Act of Congress on grounds that have no basis in the decisions of this Court construing the Free Exercise Clause of the First Amendment. The question presented is significant because the district court concluded that the government's power to levy generally imposed taxes must yield to the religious beliefs of appellee and his employees, who oppose the payment of these taxes on religious grounds. But if the production of revenue is dependent on an accommodation between the permissible religious beliefs of each taxpayer and the social welfare policies of the government, our system of taxation would be seriously jeopardized. In these circumstances, the incidental burden on the exercise of appellee's and his employees' religion must give way to the vital governmental interest in maintaining the financial integrity and general support of the social security system, and to the larger governmental interest of maintaining authority to levy taxes for the general welfare.

1. The district court held that appellee, and similarly-situated employers who are members of a religious sect which is conscientiously opposed to acceptance of any private or public insurance, are relieved from the payment of the employer's share of FICA and FUTA taxes. But the conclusion of the district court cannot be squared with this Court's decisions construing the Free Exercise Clause of the First Amendment. To be sure, the Free Exercise Clause affords substantial protection for the diverse religious beliefs and practices in this country. Thus, this Court has held that the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), or with interference with the dissemination of religious ideas. See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follett* v. *McCormick*, 321 U.S. 573 (1944). It also prohibits misuse of secular government programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S.

599, 607 (1961). "And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

It is equally well-established, however, that a person is not protected from every incidental burden on the exercise of his religion that may result from the implementation of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 603; *Johnson* v. *Robison*, 415 U.S. 361, 383–386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461–462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878). In determining whether a particular statute is supported by a governmental interest that outweighs a person's free exercise rights, it is necessary—

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

McDaniel v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring in the judgment). See *Wisconsin* v. *Yoder*, *supra*; *Johnson* v. *Robison*, *supra*. Accordingly, this Court has observed that a generally imposed income tax cannot rationally have a coercive effect on religious practices or beliefs. *Follett* v. *McCormick*, *supra*, 321 U.S. at 577–578; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); see *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Indeed, one can hardly imagine a more neutral secular activity than the payment of generally imposed taxes.

Sherbert v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, *supra*, upon which the district court relied (App.

A, *infra*, 5a-8a), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome, in the face of a less compelling government interest, than here. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in *Sherbert* was faced with an unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. Appellee faces no similar choice here.

Similarly, in *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement of a state compulsory formal education requirement after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose them to dangerous worldly influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in *Yoder* likewise offered no basis for compromise. The parents there either had to risk losing their children from their faith or violate the law. No such choice need be made here. Although appellee claims that the payment of the tax would be a sin, it does not, as the burdens in *Sherbert* and *Yoder*, threaten the integrity of his religious beliefs. See also *McDaniel* v. *Paty*, *supra*; *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

2. The district court found that members of the Old Order Amish sect consider it to be a sin to accept social

security benefits and to pay social security taxes because "it is a sin to fail to provide for or to allow another to provide for your own people" (App. A, *infra*, 3a). But the payment of FICA and FUTA taxes does not prevent appellee from providing for his own people, nor are he or any of his employees forced to accept social security benefits. The Old Order Amish can protect the integrity of their own religious beliefs and practices simply by declining to accept social security benefits and continuing to provide support for those members of their community who are in need. The payment of FICA and FUTA taxes no more commits appellee or other members of the Old Order Amish sect to a binding insurance contract in violation of their religious beliefs than does the payment of federal income taxes, which are used to support a myriad of governmental benefits, many of which they or many other religious groups may oppose. See *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

Finally, apart from the impact that FICA and FUTA taxes may have on the exercise of appellee's religion, the governmental interest in maintaining widespread participation in the social security program is paramount. To a certain extent, social security benefits are dependent on the amount of taxes paid, but there is no perfect symmetry between contributions and benefits. See *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 521–523 (1937). Appellee's FICA and FUTA taxes are commingled with other FICA and FUTA taxes and are used to support millions of other taxpayers who have no objection to receiving social security benefits and are, in fact, dependent upon such benefits. The government's ability to maintain a comprehensive social security program for the nation's unemployed and senior citizens would be severely strained if all those who could provide for themselves, either by individual or community efforts, could voluntarily withdraw from the program. The Free Exercise Clause has never been construed to interfere with such a fundamental societal activity as the payment of generally imposed federal taxes. As this Court observed in *Gillette* v. *United States*, *supra*, 401 U.S. at 461, in terms that effectively

refute the reasoning of the district court, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." Surely the obligation to pay generally imposed FICA and FUTA taxes is such a duty. See *Johnson* v. *Robison*, *supra*.

3. Contrary to the reasoning of the district court, the Section 1402(g) religious exemption from the social security tax on self-employment income does not support appellee's claim to exemption from the employer's tax on wages. Since Section 1402(g) was enacted, there have been various constitutional challenges by taxpayers who sought either to have the statute set aside or to have the exemption extended to themselves, despite their failure to satisfy all of its conditions. But the courts have uniformly rejected these claims.[3] The courts that have reached the question have concluded that the exemption provided by Section 1402(g) is constitutionally permissible[4] and, until

[3] See, *e.g.*, *Kelley* v. *Terry*, No. 78-2750 (9th Cir. Aug. 27, 1980); *Ward* v. *Commissioner*, 608 F.2d 599 (5th Cir. 1979), cert. denied, No. 79-1313 (Apr. 28, 1980); *Jaggard* v. *Commissioner*, 582 F.2d 1189 (8th Cir. 1978), cert. denied, 440 U.S. 913 (1979); *Varga* v. *United States*, 467 F. Supp. 1113 (D. Md. 1979), aff'd by unpublished order No. 79-1371 (4th Cir. Feb. 27,1980); *Chapman* v. *Alexander*, 421 F. Supp. 930 (W.D. La. 1976)), aff'd by unpublished order No. 76-6086 (5th Cir. Apr. 28, 1977); *Escofil* v. *Commissioner*, 376 F. Supp. 521 (E.D. Pa.), aff'd per curiam, 493 F.2d 1400 (3d Cir. 1974); *Randolph* v. *Commissioner*, 74 T.C. 284 (1980); *Hatcher* v. *Commissioner*, 37 T.C.M. (CCH) 304 (Feb. 14, 1978), aff'd per curiam, 79-2 U.S.T.C. ¶ 9531 (10th Cir. July 27, 1979); *Lerner* v. *Commissioner*, 34 T.C.M. (CCH) 331 (Mar. 17, 1975), aff'd by unpublished order, No. 75-1770 (3d Cir. Jan. 13, 1976); *Henson* v. *Commissioner*, 66 T.C. 835 (1976); *Palmer* v. *Commissioner*, 52 T.C. 310 (1969).

[4] See, *e.g.*, *Jaggard* v. *Commissioner*, *supra*, 582 F.2d at 1190; *Varga* v. *United States*, *supra*, 467 F. Supp. at 1118-1119; *Lerner* v. *Commissioner*, *supra*, 34 T.C.M. (CCH) at 331 n.3. Other courts, however, have declined to reach the Establishment Clause issue raised in such cases on the theory that the taxpayer involved lacked standing to challenge the constitutionality of these provisions. See, *e.g.*, *Ward* v. *Commissioner*, *supra*, 608 F.2d at 601. Cf. *Varga* v. *United States*, *supra*, 467 F. Supp. at 1119 n.7.

the decision below, no court has ever suggested that it is constitutionally required under the Free Exercise Clause. Indeed, the courts have held that conscientious objection to the social security system and the taxes designed to support that system does not constitute a valid claim to exemption under the Free Exercise Clause, whether that opposition is based on philosophical or "moral" principles (*e.g.*, *Lerner* v. *Commissioner*, *supra*, 34 T.C.M. (CCH) at 331 n.3), or on sincerely held religious principles (*e.g.*, *Varga* v. *United States*, *supra*, 467 F. Supp. at 1117-1118; *Palmer* v. *Commissioner*, *supra*, 52 T.C. at 313; cf. *Escofil* v. *Commissioner*, *supra*.[5]

Thus, while Congress as a matter of legislative grace may have permissibly made this accommodation to the religious beliefs and social practices of members of the Old Order Amish sect, it was not compelled to do so by the

[5] Such decisions are fully in accord with a similar body of cases holding that conscientious opposition, on the basis of sincerely and fervently held religious beliefs, to the use to which the government makes of its revenues, or to contributing to such use, provides no basis under the Free Exercise Clause for avoiding the obligation to pay the full measure of income taxes imposed by Congress on all citizens. See, *e.g.*, *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Autenrieth* v. *Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970); *Graves* v. *Commissioner*, 579 F.2d 392 (6th Cir. 1978); *Costello* v. *Commissioner*, 34 T.C.M. (CCH) 320 (Mar. 12, 1975), aff'd without opinion, 76-1 U.S.T.C., ¶ 9117 (2d Cir. Nov. 20, 1976); *Anthony* v. *Commissioner*, 35 T.C.M. (CCH) 1357 (Sept. 27, 1976), aff'd per curiam, 566 F.2d 1168 (3d Cir. 1977), cert. denied, 436 U.S. 904 (1978); *Runnings* v. *Commissioner*, 36 T.C.M. (CCH) 904 (July 13, 1977), *United States* v. *Haworth*, 386 F. Supp. 1099 (S.D. N.Y. 1974); *Muste* v. *Commissioner*, 35 T.C. 913 (1961); *Russell* v. *Commissioner*, 60 T.C. 942 (1973). As the Ninth Circuit observed in *Autenrieth* v. *Cullen*, *supra*, 418 F.2d at 588 (citations omitted), "[t]he Income Tax Act does not 'aid one religion, aid all religions, or prefer one religion over another.' Nor does it punish anyone 'for entertaining or professing religious beliefs or disbeliefs.' * * * It taxes plaintiffs like all others, because they are citizens or residents who have taxable income. On matters religious, it is neutral." These observations are equally applicable to the FICA and FUTA taxes at issue here. The FICA and FUTA taxes are also neutral, aiding no religion or preferring one religion over another.

Free Exercise Clause or any other provision of the Constitution. Once having granted this statutory exemption from the tax imposed by Section 1401 on income from self-employment, Congress was therefore under no compulsion to extend a similar exemption to employers and employees meeting the requirements of that section from the FICA and FUTA taxes imposed by Sections 3101, 3111 and 3301 of the Code.

The limitation in the Section 1402(g) exemption to the self-employment tax is in accord with the decisions of this Court holding that Congress has considerable discretion in the classification of taxpayers in implementing the social security system. *Carmichael* v. *Southern Coal Co., supra*; *Steward Machine Company* v. *Davis*, 301 U.S. 548 (1937). In *Carmichael* v. *Southern Coal Co., supra*, 301 U.S. at 509 (citations omitted), this Court established the permissible scope of classifications for federal tax purposes:

> This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. * * *
>
> Like considerations govern exemption from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

See also, *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970).

As we have noted, self-employed persons were generally not covered by the social security system at all until 1950 (Social Security Act Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540), and even now self-employed persons are taxed on a substantially different basis from employed individuals. Sections 1401 and 1402. In the light of the decisions in *Carmichael* v. *Southern Coal Co.*, *Helvering* v. *Davis* and *Steward Machine Co.* v. *Davis*, *supra*, it could hardly be contended that the distinction

drawn between self-employed persons and employees under either the original provisions of the Social Security Act or its present provisions is unconstitutional. The specific distinction drawn in Section 1402(g) between self-employed adherents of the Old Order Amish sect and members of that sect who employ or are employed by others is no more suspect, as a matter of either Due Process or First Amendment considerations, than the distinctions that have been drawn between self-employed persons generally.

The classification made in Section 1402(g) involves at most a difference in the tax treatment accorded employed and self-employed members of the same religious sect. Moreover, since appellee himself is treated in precisely the same manner, with respect to the FICA and FUTA taxes in question, as any other similarly situated employer, regardless of his religious beliefs, he can hardly complain that, as to himself, Section 1402(g) reflects an improper classification under either the Due Process Clause or the Free Exercise Clause.

At all events, we submit that Congress had a rational basis for limiting the Section 1402(g) exemption to the tax imposed on self-employment income under Section 1401 of the Code. The legislative history of Section 1402(g) shows that Congress was concerned that there would be no broad exception to the strongly held policy against making participation in the social security system a voluntary matter. Thus, the exemption was limited to the self-employment tax "since those persons for whom the payment of social security taxes appears to be irreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101–102 (1965). The Treasury supported this restriction because "these sects established in farming communities * * * could be more certainly relied upon to identify and provide for its dependent and elderly members than those in the mobile and transient urban environment." *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., *Pt. 2*,

1003 (1965). Moreover, the limitation of the Section 1402(g) exemption to self-employment taxes is a reasonable classification because it distinguishes between self-employed persons, who are most likely to possess the economic resources necessary to provide for themselves, and wage earners whose support may be dependent on someone else. It is reasonable to assume that even if it so desired, a religious group might not, in fact, be able to provide adequately for all its members who depend on employment, or in periods during which such individuals are otherwise unable to be gainfully employed. It was likewise reasonable for Congress to require that where such individuals depart from their traditional self-employment activities and engage in the economic community as employees or employers of others, they should be called upon to contribute to the social security system in the same measure as all other employers and employees, whether or not they ultimately choose to partake in the benefits of that system.

In sum, Section 1402(g) represents a reasonable compromise between the interest of the government in insuring maximum participation, in, and contribution to, the social security system, on the one hand, and the possibly conflicting beliefs of certain religious groups, on the other. *Committee For Public Education* v. *Nyquist*, 413 U.S. 756, 788 (1973). In attempting to implement purely neutral, secular goals through the social security system, Congress has tried to minimize, as a matter of legislative grace, otherwise justifiable burdens on members of religious groups like the Old Order Amish, without transgressing the restrictions of the Establishment Clause. *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess, Pt. 2, 996–1000 (1965). The balance it has struck in this regard does not violate the First Amendment rights of appellee or the other members of the Old Order Amish sect whom he employs.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1980

APPENDIX A

In the United States District Court
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 79-739

EDWIN D. LEE, PLAINTIFF

v.

UNITED STATES GOVERNMENT AND INTERNAL REVENUE SERVICE AND JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE, DEFENDANTS.

OPINION

This is an action for refund of $91.00 paid by plaintiff for withholding and FICA taxes on wages paid to his employees for the first quarter of 1973. The plaintiff, Edwin D. Lee, is a self-employed farmer and carpenter and a member of the Old Order Amish religion. During the years 1970 through 1977, Mr. Lee employed and paid wages to several Old Order Amish employees; however, he failed to file quarterly employment tax returns or annual unemployment tax returns, to withhold income tax or FICA tax from his employees' wages, or to pay the employer's portion of the employees' FICA or FUTA taxes. In 1978, the Internal Revenue Service assessed employment taxes in amounts exceeding $27,000. In 1979, plaintiff paid $91.00 of this amount, representing the assessment for the first quarter of 1977. His subsequent claim for refund was disallowed. The present suit was filed in July of 1979, seeking declaratory and injunctive relief from payment of the tax,

alleging the payment of the tax is a violation of his First Amendment right to the free exercise of his religion.

Once again, the Court is called upon to examine the beliefs of the Amish in the context of the First Amendment. The Old Order Amish occupy a respected and time-honored position in the history of this country. Their origins date back to the 16th century Swiss Anabaptists who separated themselves from institutionalized churches to preserve a non-competitive, closely-knit community life emphasizing "goodness" and community welfare. Throughout their history, the Amish have maintained this ideal. Despite continuing encroachment of the contemporary, worldly society, they have remained independent of society, yet interdependent among themselves. In a society witnessing the gradual erosion of such values, their efforts are worthy of preservation. Whether or not the preservation of their values falls within the present context—exemption from taxes based upon these admirable religious convictions—is the issue to be decided.

The Old Order Amish have been past recipients of both legislative and judicial grace. Section 1402(g) of the Internal Revenue Code exempts from payment of, *inter alia*, self-employment FICA taxes religious groups who provide their own form of old age and disability insurance to members of their sects.[1] In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Supreme Court exempted the group from compulsory public school attendance beyond the age of 13, stressing the importance of recognizing and preserving the Order as a "highly successful social unit within our soci-

[1] 26 U.S.C. 1402(g) Exemption.—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect of division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

ety" which "rejects public welfare in any of its usual modern forms." Plaintiff relies on the reasoning behind *Yoder* and 1402(g) for his argument to extend the exemption of 1402(g) and thereby relieve members of this sect from the requirement of withholding FICA taxes from Amish employees or from paying the employer's portion of FICA or FUTA taxes. His rationale is simple yet sincere: it is a sin to fail to provide for or to allow another to provide for your own people. "But if any provide not . . . for those of his own house, he hath denied the faith and is worse than an infidel." (I Timothy 5:8). Accordingly, they have a built-in, fool-proof social security system of their own—they care for their aged, their sick, their unemployed. They neither need nor would be permitted to accept any form of social security payments from outside their self-sufficient community. Not only is it considered a sin to *accept*, it is also considered a sin to *pay*, for to pay is to deny their faith. It is this crucial distinction which weakens an otherwise strong argument opposing Lee's claims.

The government concedes both the worthiness and the sincerity of the Amish beliefs, yet they counter with the inherent power of the government to tax. While recognizing the precedential weight of 1402(g) as a rationale for extending the exemption to include all forms of social security taxes, they argue the difference in the function of the tax. The 1402(g) exemption falls under the "income tax" provision of the Social Security tax system. The taxes at issue here—the employer's share of FICA, FUTA, and deduction of his employees' FICA taxes for which he is personally liable—are termed "excise taxes," a flat fee imposed upon an employer for the privilege of doing business, totally unrelated to the purpose served by the tax. These taxes are a contribution to a "general welfare" fund to provide for *all* who become dependent on society. As benefits under the SSA are not automatic, accruing only upon the filing of an application for receipt of benefits, plaintiff Lee need only refuse the benefits to avoid violating the precepts of his faith. This distinction between a self-employment payment as "income tax" and deduction

and payment of an employee's tax as an "excise tax" is a distinction without a difference and raising it does little credit to the government agencies concerned. Calling a rose a violet hardly changes its odor. The distinction overlooks the key contention: Payment of the tax is the sin that burdens the free exercise of the Amishman's religion.

The free exercise of one's religion is a fundamental, natural, absolute right, firmly entrenched in the foundation and the history of our legal system. Courts have given the First Amendment a broad interpretation in light of its history and the evils it was designed to prevent. When this right has come into conflict with an equally valued and respected governmental interest, the Court will apply a balancing test to determine which must yield to the other. A pattern has emerged from these conflicts which has set guidelines for determining the predominant interest. Courts have determined that while religious *beliefs* may be inviolate, religious *conduct* is not; therefore conduct jeopardizing public safety, peace, or order will fall to Governmental interest. *Reynolds* v. *United States*, 98 U.S. 145 (polygamy not protected by free exercise clause), *Prince* v. *Mass.*, 321 U.S. 158 (child labor law upheld against 9 year old child distributing religious pamphlets.) Failure to pay taxes is alleged to jeopardize the public welfare.

The government contends there is no constitutional right to be immune from taxes. The power to tax is a legitimate exercise of the government that overrides individual preference. The government draws an analogy to the challenges to the Selective Service laws as an interference with the free exercise of religion. The analogy is well taken: the power to conscript for war is also a legitimate government exercise. As in the present case, a legislative exemption was extended to those who, because of religious principles, opposed the concept of war. The cases cited by the government were attempts to expand the exemption to cover conscientious objectors who opposed particular wars (specifically, the Viet Nam war). *Gilette* v. *U.S.*, 401 U.S. 437 (1971), *Loewing* v. *U.S.*, 392 F.2d 219 (10th Cir. 1968). The expansion was denied because of the adminis-

trative burden of distinguishing valid claims from invalid ones and the political overtones inherent in such decisions. The present case presents no such problem. The group seeking exemption is clearly defined, long-recognized, and unquestionably sincere. Nor is there a danger of an open-ended category capable of uncontrolled expansion. The Old Order Amish, and groups like them, are small groups whose labor generates a small amount of wages and taxes. The loss of revenue from granting the exemption would be negligible. Clearly the granting of the exemption does not interfere with the establishment or preservation of the general welfare of the public. The history and intent of the 1402(g) exemption further underscores this conclusion:

> We believe that an exemption from Social Security taxes . . . would be justifiable only in cases where it is amply clear that an individual cannot accept the benefits of insurance, including social security benefits, without renouncing the basic tenet of his religion . . . (p. 101).
>
> . . . an exemption may be granted only if the Secretary of Health, Education & Welfare makes the following findings with respect to the religious sect: . . . That it is the practice and has been for a period of time which the Secretary deems to be substantial, for members of such sect or division thereof to make provisions for their dependent members which, in the judgment of the Secretary, is reasonable in view of the general level of living of the members of the Sect or division thereof. (p. 228).
>
> H.R. Rep. No. 213, 89th Cong. 1st Sess. (1965) pp. 101 & 228.

The Congress seems to have concluded that where a group is both religiously opposed to this form of public welfare *and* has provided its own alternative source of remedial welfare, the governmental interest has been protected and is therefore not required.

It was this same two-prong approach applied by the Supreme Court in *Yoder* v. *Wisconsin*, *supra*, that tipped the balance of interests in favor of the Yoders, an Amish family challenging the burden of a state compulsory school attendance law on the free exercise of their religion. The

combination of the burden on their religious exercise and the long standing tradition of providing alternative vocational training within their own community obviated the need for public education, and thus overrode the compelling state interest to provide for the general welfare via compulsory public school attendance to age 16.

The government points out a legislative caution in the 1402(g) exemption against any broadening of its coverage:

> The proposed exemption would be limited to the self employment tax under social security since those persons for whom the payment of social security taxes appears to be unreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment. H.R. Rep. No. 213, *supra*.

Again, the point is relevant, but it misses the mark. Mr. Lee has branched out from farming to employing others in his carpenter work. Is he to be penalized for not confining his work to self-employment? Clearly Congress has the power to both grant an exemption and to restrict its expansion, but the issue is the balancing of interests—which is to be paramount? When there is a burden on the free exercise of religion, only a "compelling" state interest will justify the state's constitutional power to regulate. *NAACP* v. *Button*, 371 U.S. 415 (1963), *Sherbert* v. *Verner*, 374 U.S. 398 (1963), *Yoder* v. *Wise*, *supra*.

As *Yoder* v. *Wisconsin* indicates, the *combination* of the burden on the free exercise of one's religion and the alternative method of achieving the same end will override the state's interest in regulating.

Sherbert v. *Verner* is on point—a South Carolina statute denied unemployment compensation benefits to a Seventh Day Adventist who, because of religious beliefs, could not work on Saturday and, therefore, could not find a job. The Court, upon weighing the competing interests, found the Seventh Day Adventists in the same dilemma as Mr. Lee—

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo

> that practice is unmistakable. The ruling force her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. 374 U.S. 398 at 404.

The Court rejected the Government's argument that the filing of fraudulent claims feigning religious objections to Saturday work would dilute the unemployment fund and disrupt the scheduling of work. The possibility of such abuse was of insufficient weight to counterbalance the burden on appellant's free exercise of religion.

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," Thomas v. Collins, 323 U.S. 516.

In dismissing the government's argument the Court stressed the need for the government to show *both* a burden on a compelling state interest and an alternative means to combat it. Both were absent in *Sherbert;* both are absent here. The exemption of 1402(g), with its complementary waiver of benefit forms, the tightly circumscribed definition of the group, and the reasoning for its exemption precludes the possibility of abuse by providing a readily available method of combatting it. Thus, even if it were arguable that the State's interest in taxing an employer to provide a general welfare fund for protection against life's misfortunes is a "compelling interest," both the burden on Mr. Lee's religious exercise and the alternative forms of compensating for the state's interest would combine to tip the scales in favor of Mr. Lee.

The Court in *Sherbert* distinguishes its decision from *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); the comparison is relevant here. In *Braunfeld*, an Orthodox Jew challenged the state's Sunday closing law as an undue burden on the free exercise of his religion. Mr. Braunfeld's posi-

tion was not unlike that of Ms. Sherbert's and Mr. Lee's—he could forego his religious principles and do business six days a week or practice his religion and cut back his business to five days a week. The distinction, however, is crucial—Mr. Braunfeld's free exercise would cost him one day's sales; the loss of Sherbert and Lee (a job in Sherbert's case and any employment requiring the help of others by Mr. Lee) is a far greater hardship. The insignificant financial hardship suffered by Jewish merchants, coupled with the lack of any alternative means for the state to provide a uniform day of rest (the "compelling state interest"), and the economic disadvantage to merchants not exempted from Sunday closings was sufficient to override the burden on the religious exercise. In the present case, the burden on the free exercise is great, and there are alternative means both for achieving any "compelling" state interest and for combatting any abuses that may arise. Thus, plaintiff Lee, and employers who fall within the carefully circumscribed definition provided in 1402(g), are relieved from paying the employer's share of FICA and FUTA as it is an unconstitutional infringement upon the free exercise of their religion.

In view of the foregoing opinion the tax is declared invalid and unconstitutional. Plaintiff has also requested injunctive relief; however, 26 U.S.C. § 7421(a) of the Internal Revenue Code specifically indicates that injunctive relief is to be granted sparingly and only in exceptional circumstances. Therefore, this Court must deny plaintiff's request for injunctive relief with the knowledge that the government has agreed not to collect such taxes during the pendency of this litigation and in the belief that the future collection activities will be circumscribed by the holding of this case. If this belief should prove to be unfounded, further Court relief could be requested.

The foregoing shall constitute findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a). An appropriate order will issue.

APPENDIX B

ORDER

AND NOW, July 15, 1980, in accordance with the foregoing Opinion, IT IS ORDERED that plaintiff's Motion for Summary Judgment is hereby granted insofar as it requested refund of $91.00 and denied insofar as injunctive relief is requested.

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is denied.

/s/ HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
United States District Judge

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APPENDIX C

In the United States District Court for the WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 79-739

EDWIN D. LEE, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the Supreme Court of the United States from the final judgment order entered in this action on July 15, 1980.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

ROBERT J. CINDRICH
United States Attorney

By: /s/_____
Assistant United States Attorney
633 U.S.P.O. & Courthouse
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Aug. 14, 1980

APPENDIX D

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.):

Section 1402. DEFINITIONS.

* * * * *

(g) [as added by Section 319(c), Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 391, as amended by Section 1901(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat.] MEMBERS OF CERTAIN RELIGIOUS FAITHS.—

(1) *Exemption.*—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act). Such exemption may be granted only if the application contains or is accompanied by—

(A) such evidence of such individual's membership in, and adherence to the tenets or teachings of, the sect, or division thereof as the Secretary may require for purposes of determining such individual's compliance with the preceding sentence, and

(B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person,

and only if the Secretary of Health, Education, and Welfare finds that—

(C) such sect or division thereof has the established tenets or teachings referred to in the preceding sentence,

(D) it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his judgment is reasonable in view of their general level of living, and

(E) such sect or division thereof has been in existence at all times since December 31, 1950.

An exemption may not be granted to any individual if any benefit or other payment referred to in subparagraph (B) became payable (or, but for section 203 or 222(b) of the Social Security Act, would have become payable) at or before the time of the filing of such waiver.

* * * * *

(3) *Period For Which Exemption Effective* An exemption granted to any individual pursuant to this subsection shall apply with respect to all taxable years beginning after December 31, 1950, except that such exemption shall not apply for any taxable year—

(A) beginning (i) before the taxable year in which such individual first met the requirements of the first sentence of paragraph (1), or (ii) before the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which such individual is a member met the requirements of subparagraphs (C) and (D), or

(B) ending (i) after the time such individual ceases to meet the requirements of the first sentence of paragraph (1), or (ii) after the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which he is a

member ceases to meet the requirements of subparagraph (C) or (D).

* * * * *

SECTION 3101 [as amended by Section 321(b), Social Security Amendments of 1965, *supra*] RATE OF TAX.

(a) *Old-Age, Survivors, And Disability Insurance* In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) [as added by Section 321(b), and amended by Sec. 111(G)(5), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

SECTION 3102. DEDUCTION OF TAX FROM WAGES.

(a) [as amended by Section 205A, Social Security Amendments of 1954, ch. 1206, 68 Stat. 1052, Section 201(h)(3), Social Security Amendments of 1956, ch. 836, 70 Stat. 807, and Section 313(c)(2), Social Security Amendments of 1965, *supra*] *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar quarter pays to an employee cash remuneration to which paragraph (7)(B) or (C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax from

any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar quarter is less than $50; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150 and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (12)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

* * * * *

SECTION 3111 RATE OF TAX.

(a) [as amended by Section 321(c), Social Security Amendments of 1965, *supra*] *Old-Age, Survivors, And Disability Insurance.*—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) [as added by Section 321(c), and amended by Section 311(c), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) but without regard to the provisions of paragraph (9) thereof insofar as it relates to employees)—

* * * * *

SECTION 3301 [as amended by Section 301(a), Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 713] RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

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